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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1718

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, MOLLY BRONSTEIN, and All Other Intervenors In The District Court,

Appellants,

vs.

UNITED AMERICANS FOR PUBLIC SCHOOLS, a Corporation, et al.,

Appellees.

On Appeal from the United States District Court for the Northern District of California

Motion to Affirm or Dismiss

HENRY C. CLAUSEN
234 Van Ness Avenue
San Francisco, Ca. 94102
Tel: (415) 626-0234

Attorneys for Appellees Americans United for Separation of Church and State, a corporation, William F. Poynter, Chester Mac Phee, Henry Schindel, Mary Middleton

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Pursuant to Rule 16, of the Rules of this Court, the appellees move to dismiss the appeal herein, or, in the alternative, move that the judgment of the District Court be affirmed on the ground that the questions raised by appellants are so insubstantial as not to warrant further argument.

QUESTION PRESENTED

Whether, in light of *Committee for Public Education and Religious Liberty v. Nyquist*, 392 U.S. 236, appellants pose any question of substance warranting further argument in this Court.

STATEMENT OF THE CASE

This is a direct appeal from a summary judgment of a statutory three-judge District Court entered February 1, 1974, which permanently enjoined appellant Franchise Tax Board of the State of California from executing the provisions of Sections 17065-17067 of the California Revenue and Taxation Code, Stats. 1972, c. 1260, as being violative of the Establishment Clause of the First Amendment to the United States Constitution. The statute is set forth in Appendix B of appellants' Jurisdictional Statement and granted tax credits to parents of non-public school children. As appellees contend and the Court below decided, the statute is similar in all material respects to part of the New York statute struck down by this Court in Nyquist.

Appellees commenced this litigation on January 16, 1973, by their complaint praying for restraining order, preliminary and permanent injunctions. For the purpose of meeting legal requirements for such equitable relief, the complaint is verified and contains what may perhaps be some evidentiary matter. Appellant Franchise Tax Board filed its answer thereto on or about February 2, 1973. Said answer is unverified and consists mainly of denials. On July 6, 1973, appellees moved the Court for a preliminary injunction, coupling the motion with the affidavit of Henry C. Clausen, Jr., and citing the recently decided *Nyquist* case, *supra*. The affidavit, which appellants characterize as pure hearsay, contains the then latest statistics promulgated by the State Superintendent of Public Education respecting the number of students enrolled in non-public elementary and high schools which were church-related. Said statistics are required to be kept by California law. It also quotes by way of admission or declaration against interest statements made by authoritative sources concerning the religious purpose, make-up, and curricula of church-related schools. This affidavit remains uncontro-

verted by any counter-affidavit or offer of proof. No objection thereto was made in the District Court. Nor was it subject to any motion to strike. On July 11, 1973 appellees filed their motion for summary judgment, based upon the same case and affidavit. Both motions were set to be heard on August 28, 1973.

On or about August 24, 1973, appellant-intervenors filed their motion to intervene, together with their proposed answer, again unverified, and, on or about August 24, 1973, appellant Franchise Tax Board filed several affidavits, all to the effect that it costs more than $125.00 per year to teach secular subjects in the affiants' respective private schools. (The tax maximum credit allowed under the Statute is $125.00.)

Neither appellant State nor Intervenors filed any motions to strike or make more certain the allegations of the complaint.

Hearing was held on the motions on August 28, 1973. By stipulation of all parties, the Court granted a preliminary injunction on August 31, 1973. There is of course no appeal therefrom.

At the hearing, counsel for intervenor-appellants raised objection to the allegation in the complaint to the effect that of the numbers of non-public school students found under Section 2(a) of the statute some 90% attend Roman Catholic schools. He offered to prove among other things, that the percentage was only 69%.

The case was argued extensively, and by permission of the Court, appellant-intervenors were permitted to file a brief, which they did on or about September 4, 1973. Appellees responded on or about September 10, 1973 with their own brief, consisting of 11 pages and citing and discussing some 10 Supreme Court authorities. (Cf. appellant's statement on page 9 of the Jurisdictional Statement that

the motion for summary judgment was "accompanied" only by citation of the *Nyquist* case.)

On December 28, 1973 Justice Hamlin died, but the opinion signed by the remaining two judges states that, "Before his death, Judge Hamlin, Jr. concurred in the result reached in this case." (Appellants seem to argue obliquely by way of footnote that such fact makes the judgment void, citing *Ayrshire Corp. v. U.S.*, 331 U.S. 132—page 13 of the Jurisdictional Statement. However, in view of the extensive argument, oral and written, "heard" by him and the statement by the Court that Judge Hamlin had already "determined" the outcome of the case prior to his death by concurring in the result, that case is therefore inappropriate, and we suspect appellants do not seriously argue the point.)

The opinion of the Court indicates that the *Nyquist* case was decisive, despite the affidavits submitted by appellant State board. The effect of these, contrary to appellants' assertion in their Jurisdictional Statement, is expressly referred to therein.

ARGUMENT

THERE IS NO QUESTION OF SUBSTANCE

If ever a case cried out for affirmance without argument, this is the case! California's statutory scheme to afford tax relief to parents of students attending church-related schools is practically identical to part of New York's statutory scheme held invalid only recently by the Court in the *Nyquist* case, *supra*. Whatever distinctions appellants perceive between the two statutes are at the most distinctions without a difference. And whatever substantive arguments appellants raise have already been laid to rest by the Court in its *Nyquist* holdings.

Appellants seem to argue two things. First, they condemn the complaint as being inartfully drawn and consisting of conclusions and evidentiary facts. No case is

cited to substantiate this claim, and it should be sufficient answer to say that appellants made no motions to strike or to make more definite the allegations thereof. Furthermore, to the extent that evidentiary facts are therein verified, they constitute further ground for affirmance.

Second, appellants condemn use of the summary judgment procedure. Appellees, on the other hand, contend that such procedure in this case was most appropriate!

Rule 56 provides that summary judgment should be granted if the pleadings and affidavits "show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to judgment as a matter of law". (Emphasis added).

In light of said rule consider the factual posture of the case at the hearing on motion for summary judgment. The statute finds in Sec. 2(a) that out of approximately 5,000,000 children attending grades kindergarten through 12 in California, 392,442 attend nonpublic schools. This finding is not denied. Appellees' verified complaint alleges that as of October 1, 1971 the latter figure was 409,421, of which 351,425 attended religious related schools, and "some" 90% of the latter attended schools affiliated with the Roman Catholic Church. Appellees' affidavit, citing later statistics, has somewhat different figures. None of these statistics is controverted by affidavit or verified denial, except that appellant-intervenors offered to prove that at present the 90% figure should be 69%. Thus the District Court properly found the *material* fact that the California tax credit benefits primarily those taxpayers who send their children to sectarian schools. The offer of proof, and the various statistics present nothing more than distinctions without a difference.

Appellants also argue that there was a genuine issue of fact respecting the religious purpose, make-up, and cur-

ricula of the sectarian schools so benefited, all as alleged in appellees' verified complaint (such as Paragraph 9 thereof), because these allegations are denied in appellants' unverified answers. But the factual posture of the case at the hearing belies this argument, and indeed it would be preposterous to suppose otherwise—(as this Court stated in *Early v. Di Censo*, 403 U.S. 602, ". . . parochial schools involve substantial religious activity and purpose.") How could appellants prove the contrary of the proposition as alleged in said paragraph 9 that the sectarian schools benefited by the California tax credit *could* be ones that:

> "(a) impose religious restrictions on admission; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach"?

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 767-768.

In any event, appellants' unsworn denials, by the express terms of Rule 56(e), do not create genuineness of this purported issue. But, on the other hand, appellees' verified complaint may well be treated as an affidavit in support of their motion for summary judgment. *Fowler v. Southern Bell Tel. & Tel. Co.*, 343 Fed. (2d) 150 (C.A. Ga. 1965); *Fletcher v. Norfolk Newspapers, Inc.*, 239 Fed (2d) 169 (C.A. Va. 1956). Thus, for the purpose of the motion for summary judgment, appellees' allegations respecting the religious purpose, make-up, and curricula of the sectarian schools stand uncontroverted.

Moreover, those allegations are corroborated by appellees' uncontroverted affidavit filed in support of the motion. Contrary to appellants' statement that appellees attempted no showing, and that appellees' affidavit was "of no legal value in support of the motion" be it noted again that appellants neither objected to said affidavit nor moved to strike it. The District Court was therefore quite justified in considering said affidavit in ruling on the motion for summary judgment. *Klingman v. National Indemnity Co.*, 317 Fed. (2d) 850 (C.A. 7th, 1963).

The *only* evidence presented by appellants at the hearing on the motion were the State agency's affidavits to the effect that it costs more than $125.00 per year to teach secular subjects in sectarian schools. From this fact, which we concede to be true but of no material value, together with some difference in wording between the California and New York statutes, appellants attempt to find some distinction from the *Nyquist* case. They miss the point.

This Court held that:

> "INSOFAR AS SUCH BENEFITS RENDER ASSISTANCE TO PARENTS WHO SEND THEIR CHILDREN TO SECTARIAN SCHOOLS, THEIR PURPOSE AND INEVITABLE EFFECT ARE TO AID AND ADVANCE THOSE RELIGIOUS INSTITUTIONS."
> (*Nyquist*, 473 U.S. at 793)

Such is the undisputable fact here.

This being so, what difference does it make how much the taxpayer actually paid for nonpublic school tuition? Appellants fail to show any significance in this purported distinction between the California and New York statutes. And, what difference does it make whether or not the New York tax credit bore a relation to the cost of public education? In any case, as the Court held, "the money involved represents a charge made upon the state for the purpose

of religious education." (*Nyquist*, 473 U.S. at 791) And, finally, what materiality do appellants' affidavits have? This Court has already disposed of the possible argument that the $125.00 tax credit figure would statistically assure that any benefit would be for secular purposes.

> "Obviously, if [this argument were] accepted, this argument would provide the foundation for massive, direct subsidization of sectarian elementary and secondary schools. Our cases, however, have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of 'effect' and 'entanglement'."
> (*Nyquist*, 413 U.S. at 787-788)

Interestingly enough, appellants find no fault with the holding of the Court in the *Nyquist* case. It therefore becomes unnecessary to rehash all the many and good reasons supporting that decision. Appellants, however, do caution on page 12 of their Jurisdictional Statement that the tax credit parts of the New York statute should be distinguished from its other parts, as though therein lies some secret and obscure difference in effect. But the Court has already called to a halt this "legal minuet".

> "In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under Sec. 2. The qualifying parent under either program receives the same form of encouragement, and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that 'in both instances the money involved represents

> a charge made upon the state for the purpose of religious education.' 350 F. Supp., at 675."
> (*Nyquist*, 413 U.S. at 790-791).

Finally, let it be said, contrary to appellants' argument and purported authorities, there was no abuse of summary judgment here. It was neither dangerous nor invalid, nor do any of those purported authorities so hold. On the contrary, summary judgment has been established as an especially warranted procedure on First Amendment violations involving church-schools. Thus in the *Nyquist* case itself no record was developed. In *Board of Education v. Allen*, 413 U.S. 756, the case came up on pleadings. And in *Sloan v. Lemon*, 413 U.S. 825, decided the same day as *Nyquist*, summary judgment was affirmed.

Furthermore, none of the cases cited by appellants on page 10 of their Jurisdictional Statement purports to support their contention that summary judgment was inappropriate on this "delicate" constitutional question. *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, deals with a market valuation under gas leases. *United States v. Diebold*, 369 U.S. 654 deals with anti-trust and conflicting inferences from controverting affidavits and exhibits. *Adickes v. Kress & Co.*, 398 U.S. 144, dealt with refusal to serve food because of racial discrimination. *Tilton v. Richardson*, 403 U.S. 672 has nothing to do with summary judgment. Furthermore, the attempt of appellants to invoke their right of Free Exercise as a reason for finding summary judgment inappropriate, as argued on page 12 of the Jurisdictional Statement, is itself answered by *Nyquist* holding this argument also specious:

> "Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits

render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions." (*Nyquist*, 413 U.S. at 793)

CONCLUSION

We submit that appellants have shown no substantial question warranting further argument in this Court. They have failed to show any genuine issue as to any material fact and therefore the summary judgment should be affirmed on motion.

Why burden this Court, already confronted with overlarge caseload, with time-wasting argument, when the Court has spoken on the precise point. The record of the Court contemplates this kind of termination for this type of case and with good reason. There must be finality with respect to similar facts and law so that the courts may attend to cases properly clamoring for attention.

Respectfully submitted,

HENRY C. CLAUSEN
234 Van Ness Avenue
San Francisco, Ca. 94102
Attorneys for Appellees